

adduced, than would stifle the proposition well. And especially compelling, rising above the criteria of United and Imperial are the potentially devastating revelations in the discovered SCB documents, whatever their age or vintage. This Radifone action, in good measure, honors the very object of discovery — to seek and ascertain that sometimes elusive object, the truth.

13. For the foregoing reasons, the necessary premise appearing suggesting a prima facie showing warranting, to the extent set out herein below, an enlargement of the issues presently at bar, the issues are RECAST and MODIFIED as follows:

1. Issue (a) is RECAST;
 2. Issue (b) as set out in the Disposition Order is RECAST;
 3. A new Issue (c) is IMPOSED, as to:
- (1) To determine whether SCB has in the past, or is presently engaged in unjust or non-compensatory activities or practices prohibited by the Communications Act of 1934, as amended, and/or the rules, decisions or policy of the Federal Communications Commission respecting and imposing non-compensatory rates for Improved Mobile Telephone Service in Louisiana; and non proportionate and unjust rates;
- (2) Whether SCB has violated Section 201(a) or (b) of the Communications Act by wrongfully refusing to provide selective level interconnection to Radifone;
- (3) Whether SCB has charged or is charging rates for annual mobile telephone service in Louisiana which are non-compensatory;
- (4) Whether SCB has unjustly discriminated in the past or is presently unjustly discriminating between its annual mobile service and its properly seasonal service in Louisiana.
- (5) Whether SCB's proposed MM rates in Louisiana are noncompensatory and would result in cross-subsidization.

4. Issue (c) as set out in the Designation Order is ~~DELETED~~ and new ISSUE (c) is ~~REMOVED~~; to wit:

(c) To determine in the light of the evidence adduced under the foregoing issues whether the public interest, convenience and necessity would be served by a grant of the above-mentioned applications with or without additional conditions.

5. Issue (d) as set out in the Designation Order is ~~DELETED~~, being superfluous and unnecessary.

16. Radiofone's argument in disagreement with the Bureau concerning the proposed Issue (e) has been fully considered in all of its submissions respecting the reach of Section 309 of the Communications Act and related policies and cited precedent. The Bureau's position is well on point and is accepted. Radiofone's position on this point remains unpersuasive.

17. This action, without doubt, casts new light on the nature breadth and depth of prospective evidence in this case. Thus, the discussions in Memorandum Opinion and Order, FCC 80M-246, released February 12 1980, and Memorandum Opinion and Order, FCC 80M-148, released January 13 1980, to the degree or extent necessary, are ~~MODIFIED~~ to reflect that the preferences of prospective evidence under the issues, as now framed, ~~ARE~~ ~~COMPLIED~~ with the customary evidential (evidentiary) preferences relevant to the issues as are permitted in the Rules of Practice and Procedure ~~existing~~ in this agency.

18. Radiofone 2/ has also proposed, should the Motion be approved, certain action regarding the Burdens of Proceeding and of Proceduralizing heavily on the ubiquitous United Telephone and Bendix Telephone precedent. That precedent, though fully recognized but notwithstanding, does not require the inference as to burdens in all cases, similar or even very similar. The distinctions between those precedent and the case at bar were made explicit herein. Through the offices of Radiofone, past even good offices, disclosures resulting from the Discovery efforts have set the stage for a prima facie showing of the allegations affecting SCM SCM, unlike the conditions in cited precedent, has engaged in every permissible step of an adversary in litigation. It has freely disclosed

2/ Radiofone's and SCM's concerns respecting lack of verified pleading fully satisfied by Radiofone's Reply at para. 10.

that which Baddeleone sought to discover, albeit following mandatory action of the Court. Again, as SCB contended, his action amounted to nothing more than perfectly proper, perhaps very careful advocacy.

19. Especially when dealing with competent counsel, as here, the role of the Court does not comprehend suggestions as to how to try one's case or to suggest the theory of pursue of one's case-in-chief. This is the exclusive role of counsel advocates. Though, various aspects the Communications Act and the general rule in administrative jurisprudence customarily attaches the evidential burdens to applicants, particularly today, as with Baddeleone, virtually always are assigned the evidential burdens. And while it is recognized there may be a similarity here to some of the conditions in United Telephone where relevant information may be "peculiarly within the knowledge of the applicant," the very formula of United suggesting issues enlargement have been generated under the traditional avenues in civil litigation pursued by the petitioner as party; with the applicant, SCB, actively opposing, over a period of years Baddeleone's allegations "not more than procedural arguments and with [more than] a one sentence denial" as in United.

20. In United, the considerations were instilled ones leading to the promulgation of a Despatch Order. Here, after broad and deep consideration of the adversary positions, the Commission positioned particular issues short of Baddeleone's more expansive hopes. Indeed, the Despatch Order at some length rejected, on the grounds of the comprehensive pleadings before it, the principal thesis underlying Baddeleone's broadly based allegations. Baddeleone here occupies a role not unlike a private advocate general and that role, with all the avenues of litigation and its tools available to it, requires no fitness — due process if you will — something more than laying all evidential burdens on SCB, especially the one notes the potential reach and consequence of the issues as enlarged.

21. Hence, while Baddeleone has demonstrated by a pro se facie showing the need to raise additional issues at trial, under fairness if not the ends of justice, it will be assigned the competence burden of proceeding with the introduction of evidence; this is, establishing a pro se facie case under the issues as enlarged or modified. The burden of proof under all issues enlarged and original — the onus of contradicting or overthrowing — shall be assigned to SCB, principally grounded on the general rationale in United "where the operative facts [may be] peculiarly within the knowledge" of SCB.

22. By separate action, the scheduled admissions hearing has been cancelled to permit further exploration at a further pre-hearing conference of future procedural arrangements necessitated by this action.

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As the excess fee forth hereinabove, the instant Motion to
Relieve is GRANTED.

IT IS SO ORDERED.

James J. Hanley
Administrative Law Judge
Federal Communications Commission

William J. Belknap
Secretary

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Before the
Federal Communications Commission FCC 80M-1392
Washington, D. C. 20554 34544

In the Matter of)
Application of) 8/6/80
SOUTH CENTRAL BELL)
TELEPHONE COMPANY)
For construction permit for) CC Docket No. 79-250
modification of DPLMRS station) File No. 21870-CD-P-(4)-75
KKI454, at Houma, Louisiana, to)
replace equipment, add channels,)
and to furnish Improved Mobile)
Telephone Service)
and)
For construction permit for) CC Docket No. 79-251
modification of DPLMRS station) File No. 20437-CD-P-(15)-75
KKD292 at New Orleans, Louisiana,)
to add channels and to furnish)
Improved Mobile Telephone Service)

MEMORANDUM OPINION AND ORDER
Issued: August 4, 1980; Released: August 6, 1980

By James F. Tierney, Administrative Law Judge:

1. For consideration and disposition are: Motion To Dismiss Without Prejudice filed July 21, 1980 by South Central Bell Telephone Company (SCB); "Comments" on that Motion filed July 23, 1980 by Radiofone, Inc. (Radiofone) and "Comments" of the Chief, Common Carrier Bureau (Bureau) filed July 30, 1980. 1/

2. SCB premises its grounds for dismissal of its applications for the captioned facilities without prejudice on the contents of a letter addressed to an official of the Common Carrier Bureau and attached to its Motion; in a word, over five years having elapsed since the filing of its application "it does not appear likely that the proceeding...relating to these applications,

1/ Other related pleadings are Motion To Enlarge Issues and Addendum filed June 24, 1980 and June 25, 1980 respectively by Radiofone and Opposition to that Motion by the Bureau filed July 23, 1980. These pleadings, though noted, under the disposition here may be dismissed as moot.

including all permissible appeals, will be concluded in the near future." Ordinarily, that letter or its contents should have been addressed to this forum or at least fully recited in SCB's Motion, this matter being in the adjudicatory stage. Yet, however unorthodox, the manner chosen is not otherwise disabling. What is of concern, as pointed out both by Radiofone and the Bureau, is SCB's thesis of proposed dismissal "without prejudice."

3. In administrative and regulatory procedures -- sad to admit -- the virtual fact of life; a matter of "five years" duration is hardly uncommon and it would seem that SCB would be no stranger to that, at times, lamentable condition. Thus, whatever the suggested prospect of protracted finality here and at appellate levels, SCB's decision to dismiss is entirely its own "business judgment." Mahaffey Message Relay, Inc., 74 FCC 2d 518 (1979) and precedent cited therein. Indeed, as Radiofone observes Rule 1.748 and 22.28 (47 CFR 1.748 and 47 CFR 22.22) require a threshold showing of "good cause" to warrant dismissal "without prejudice." Thus, SCB's decision to dismiss is little more than an in-house "business judgment", a matter or circumstance wholly within its control (Cf. Rule 73.3568 - 47 CFR 73.3568). As such "good cause" is totally wanting.

4. Another matter -- noted and urged by Radiofone and the Bureau. Termination of this proceeding by SCB's chosen route, otherwise proper, leaves "unresolved several very serious issues presently outstanding against" SCB. Though these, as with all given issues, remain at the level of but customary allegations subject to the traditional rigors of proof, they, nevertheless, suggest momentary pause to note, even with partial favorable disposition here, the Commission remains free to examine these unresolved matters in any future application proceedings involving South Central Bell. Mahaffey, supra.

5. With that note, the public interest would not be disserved by foreclosing further expenditure of public and private resources in this endeavor. Hence, for the reasons given herein, SCB's Motion IS GRANTED, in part, and SCB's captioned applications ARE DISMISSED, with prejudice; that being done, this proceeding IS TERMINATED.

IT IS SO ORDERED.

James F. Tierney
Administrative Law Judge
Federal Communications Commission

William J. Tricarico
Secretary

000059